OVERSEAS UNION BANK LTD.

v.

MING ANN HOLDINGS SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' ABDUL AZIZ BIN MOHAMAD J
[ORIGINATING SUMMONS NO. S3-24-849-92]
1 DECEMBER 1994

LAND LAW: *Section 256 NLC - Order for sale - Land charged to secure overdraft facility - Facility repayable on demand - Whether paragraph 56 of charge annexure restricts the right to repayment on demand - Consideration of paragraphs 1, 2 & 30 of the charge annexure and ss. 253, 254 & 255 of the NLC - Whether s. 254 is applicable to an overdraft payable on demand - Whether the consequence in s. 254(3)(a) of failure to comply with the notice in Form 16D indicates that Form 16D and s. 254 are only applicable to a term loan - Whether s. 255 is obligatory for principal sums payable on demand - Whether inclusion of allegation of default in notice of demand rendered notice and consequently Form 16D invalid.*

This was an application for an order for sale of two pieces of land under s. 256 of the National Land Code (NLC) and ancillary orders. The land in question had been charged to the plaintiff bank to secure an overdraft facility. As at 18 April 1992, the defendant was indebted to the plaintiff in the sum of RM1,224,835.17. A solcitior's notice dated 4 April 1992 was sent to the defendant alleging that the defendant had defaulted on the repayment amounts and demanding payment within 7 days failing which action would be taken to foreclose the said property. The defendant was in breach as at 12 May 1992 upon failure to pay after the 7 days. By 20 July 1992, the breach had continued for more than 2 months and a notice in Form 16D was issued which gave 14 days for the breach to be remedied. The breach was not remedied and on 1 October 1992 this application was made.

Counsel for the defendant contended, *inter alia*, that under paragraph 56 of the charge annexure, so long as rental was being paid to the plaintiff pursuant to the assignment, the defendant had not defaulted and the plaintiff could not demand repayment of the total amount owing. It was also contended that the consequence in s. 254(3)(a) of failure to comply with the notice in Form 16D indicated that s. 254 and Form 16D were only applicable to a term loan and to a breach in the form of a failure to pay a particular instalment or instalments as the consequence is that the whole sum secured by the charge shall become due and payable. Question also arose as to whether the allegation of default in the notice of demand rendered the notice and consequently Form 16D invalid.

Held:

[1] Paragraph 56 is not meant to restrict the right of the plaintiff to repayment on demand of the amount owing. Clause 56 is merely to ensure that in any case the plaintiff would at least have some money coming from the rentals. It is paragraph 1 of the annexure that gives the plaintiff the right to repayment on demand and paragraph 2 provides for the manner in which the demand is to be made. At the time of the notice of demand pursuant to paragraph 2, there would have been no specific default or breach that is capable of being pointed to. It is only upon non-payment at the lapse of 7 days that a default or breach occurs, and that is a breach of the convenant to pay on demand. The fact that 7 days' grace is given

does not make it any less a case of repayment on demand. The grace period is given because to demand immediate payment may be to demand something that would be impossible to meet.

[2] The period for remedying the breach after service of Form 16D is either one month or any alternative period specified in the charge. The alternative period in this case is, as provided in paragraph 30, not less than 7 days. The failure to remedy the breach within the alternative period would, under s. 254(3)(b), entitle the plaintiff to apply for an order for sale. Therefore s. 254 is perfectly capable of being applied to a case of an overdraft payable on demand.

[3] It may be argued that the consequence in s. 254(3)(a) of failure to comply with the notice in Form 16D indicates that Form 16D and s. 254 are only applicable to a term loan but the qualification "(if it has not already done so)" would defeat that argument. Those words render the consequence in paragraph (a) and any implication to be drawn from it inapplicable where the whole sum secured by the charge has already become due and payable 7 days after the demand under paragraph 2.

[4] The words "Special provision" in the marginal note and "Without being required to serve the notice in From 16D under subsection (1) of s. 254" indicate that s. 255 is an alternative procedure for principal sums payable on demand. Such being the nature of s.255, it is not obligatory that it be resorted to, and Form 16E be used, for principal sums payable on demand. The fact that paragraph 30 of the annexure makes the issuance of the statutory notice dependent on failure to remedy the breach indicates that the parties intended that the route to an order for sale should be through s. 254 and Form 16D and not through s. 255 and Form 16E.

[5] The allegation of default in the solicitor's notice was an unjustified allegation but it could not have prejudiced or misled the defendant in any way. It must or should have known that there had been no default, that the plaintiff was entitled to repayment on demand, and that the plaintiff was making a demand in exercise of that right.

[Application granted].

Legislation referred to:
National Land Code, ss. 253(1), 254(1) & (3), 255(1), 256

Other sources referred to:
Paget's Law of Banking, 10th Edn., (1989)

For the plaintiff - C.Y. Wong; M/s. Darshan Chong & Co.
For the defendant - Stanley Chang; M/s. Stanley Chang & Associates.

JUDGMENT

Abdul Aziz bin Mohamad J:

This is an application for an order for sale of two pieces of land under s. 256 of the National Land Code and for ancillary orders. It is common ground that the lands in question have been charged to secure an overdraft of RM1,300,000 which was later reduced to RM1,200,000. The charge was executed on 4 December 1990 and registered on 6 December 1990. As at 18 April 1992 the chargor, that is the defendant, was indebted to the plaintiff bank in the sum of RM1,224,835.17 on the overdraft, including interest up to that date. There would of course be further interest at the agreed rates on that amount until full settlement.

Ordinarily an overdraft is repayable on demand. If the borrower has agreed to repay on demand, the bank has a right to demand full repayment at any time without giving any reason or period of notice. That is what I understand the position to be from the passages under the heading "(i) **Nature of an overdraft**" at pp. 182 and 183 of *Paget's Law of Banking*, 10th Edn., (1989), and the footnotes thereto, to which my attention was drawn by learned Counsel for the defendant.

Learned Counsel for the defendant, however, referred to two matters in those passages which he saw as qualifying the right to repayment on demand. But I do not think they are pertinent in this case. One matter is the concern that the right should not be exercised so as to prejudice the borrower's interests, but the example of such an interest given in those passages and their footnotes is the borrower's expectation that cheques draw before a demand for repayment or a notice of termination of facility has been given should be honoured. The obligation of the bank, if any there be, to honour such cheques is a matter quite separate from the right to demand repayment at any time. The bank can still demand repayment and at the same time honour such cheques, the amount owing being increased accordingly later.

The other matter is the question of a term loan being made subject also to a right to repayment on demand. In such a case the provision for a term loan would take precedence as "The right to repayment on demand is repugnant to the main object of the transaction". The case here is not such a case.

Learned Counsel for the defendant's main concern about the right to repayment on demand of an overdraft is really the unfairness to a borrower who has just used his overdraft facility to the full and is immediately asked to repay the whole amount without any reason or notice. The borrower then simply would not have any money to pay. But the likelihood of such a mean and silly thing actually happening to an innocent borrower is more imagined than real. That kind of concern does not find anything to entertain it in the passages referred to. If there is such a risk, a person who goes for an overdraft, whose terms must necessarily be controlled by the bank, simply must accept the risk.

The provisions in the annexure to the charge in this case clearly intend that the overdraft be repayable on demand, even though there is para. 56 which has the effect of obliging the defendant to assign to the plaintiff all rental payments due to the defendant from the tenant of the lands to secure repayment to the plaintiff of moneys due to the plaintiff under the charge. Learned Counsel for the defendant contended that that was all the payment the defendant was obliged to make to the plaintiff and that so long as rental was being paid to the plaintiff pursuant to the assignment, the defendant had not defaulted and the plaintiff could not demand repayment of the total amount owing.

With respect I do not think para. 56 is meant to restrict the right of the plaintiff to repayment on demand of the amount owing. Clause 56 is merely to ensure that in any case the plaintiff would at least have some money coming from the rentals.

Paragraph 1 of the annexure is the provision that gives to the plaintiff the right to repayment on demand. By it the defendant convenants that "the chargor(s) will on demand pay to the Bank all sums of money which are now or shall from time to time or at any time hereafter be due or owing by the Chargor(s) ...". It simply means that whatever may be owing to the plaintiff at any time, the defendant promises to pay all of it whenever demanded by the plaintiff.

Paragraph 2 provides for the manner in which the demand is to be made. It is to be made by "a notice in writing requiring payment within seven (7) days from the date thereof".

Now at the time of the notice of demand pursuant to para. 2 there would have been no specific default or breach that is capable of being pointed to. There would only be the decision to recall the facility, which decision, I would venture to think, would have been made upon the consideration that it would be unwise, from the banking point of view, to allow the facility to continue. It is only upon non-payment within seven days that a default or breach occurs, and that is a breach of the covenant to pay on demand. The breach occurs when the seven days lapse.

The fact that seven days' grace is given does not make it any the less a case of repayment on demand. The grace period is given because to demand immediate payment may be to demand something that would be impossible to meet.

Paragraph 30 of the annexure deals with what happens when the breach occurs. It allows the breach to be remedied within seven days. The whole amount due must be paid within seven days of the breach, that is, of the expiry of the seven day period in the notice under para. 2. If that is not done, the plaintiff has the right to forthwith give the statutory notice under the National Land Code to remedy the breach within not less than seven days.

Before I go on to deal with what actually happened in this case, let me touch on the relevant provisions of the National Land Code.

Subsection (1) of s. 253 provides as follows:

> (1) The provisions of this Chapter - that is Chapter 3 - shall have effect for the purpose of enabling any chargee to obtain the sale of the land or lease to which his charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein.

It is to be noted that the breach that would enable a chargee to obtain the sale of the charged land is "a breach by the chargor of any of the agreements on his part expressed or implied" in the charge. It would include the breach of covenant in this case occurring at the end of the seven days' grace given in the notice under para. 2.

Subsections (1) and (3) of s. 254 provide as follows:

> (1) Where, in the case of any charge, any such breach of agreement as is mentioned in subsection (1) of s. 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in Form 16D:
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> (a) specifying the breach in question;
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> (b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and
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> (c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain order for sale.
>
> (3) If at the expiry of the period specified in any such notice the breach in question has not been remedied:
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> (a) the whole sum secured by the charge shall (if it has not already done so) become due and payable to the chargee; and
>
> (b) the chargee may apply for an order for sale ...

The breach referred to in subsection (1) would, in this case, include the breach of covenant mentioned earlier. Subsection (1) allows a period of at least one month or any alternative period specified in the charge for remedying the breach before the statutory notice in Form

16D may be served on the chargor. The alternative period in this case, by para. 30, is seven days, so that if the repayment demanded is not made within seven days of the breach, that is, within seven days from the end of the seven day period of notice under para. 2, the plaintiff would be entitled to serve the notice in Form 16D.

The period for remedying the breach after service of Form 16D is either one month or any alternative period specified in the charge. The alternative period in this case is, as provided also in para. 30, not less than seven days.

The failure to remedy the breach within the alternative period would, under para. (b) of subsection (3), entitle the plaintiff to apply for an order for sale.

It will therefore be seen from the foregoing that s. 254 is perfectly capable of being applied to a case of an overdraft payable on demand and that a notice in Form 16D is perfectly in order in such a case if the circumstances of the case meet the terms of s. 254.

It may be argued that the consequence in para. (a) of subsection (3) of failure to comply with the notice in Form 16D indicates that Form 16D and s. 254 are only applicable to a term loan and to a breach in the form of a failure to pay a particular instalment or instalments, by reason that the paragraph says that the consequence is that the whole sum secured by the charge shall become due and payable. But the qualification "(if it has not already done so)" would defeat that argument. Those words render the consequence in para. (a) and any implication to be drawn from it inapplicable where the whole sum secured by the charge has already become due and payable, as in this case it would have become due and payable seven days after the demand under para. 2.

Section 255 is described in the marginal note as a "Special provision with respect to sums payable on demand". Subsection (1) of s. 255 says:

> (1) Where the principal sum secured by any charge is payable by the chargor on demand, the chargee may make the demand by a notice in Form 16E, and in that event, if the sum in question is not paid to him within one month of the date on which the notice is served, may apply forthwith for an order for sale without being required to serve a notice in Form 16D under sub-section (1) of s. 254.

The words "Special provision" in the marginal note and the words "Without being required to serve a notice in Form 16D under subsection (1) of s. 254" indicate, to my mind, that s. 255 is for an alternative procedure for principal sums payable on demand. Such being the nature of s. 255, it is not obligatory that it be resorted to, and Form 16E be used, for principal sums payable on demand. The chargee may choose to act under s. 254 in reliance on a breach of agreement and serve a notice in Form 16D.

The fact that para. 30 of the annexure makes the issuance of the statutory notice dependent on failure to remedy the breach indicates that the parties intended that the route to an order for sale should be through s. 254 and Form 16D and not through s. 255 and Form 16E. If they had intended the s. 255 route, they would not have provided for the issuance of the statutory notice to be dependent on an unremedied breach, seeing that such dependence is not necessary for s. 255.

Now let us see what actually happened in this case.

There was first a solicitors' notice dated 4 May 1992 stating that the amount due by 18 April 1992 was RM1,224,835.17 and demanding payment within seven days, failing which action would be taken "to foreclose the said property". However, the letter began by alleging that - "you have defaulted the repayment amounts", as though the amount stated was the amount

in respect of which default had been made. In actual fact there had been no default yet. If the solicitors had carefully examined the annexure they would have seen that the only provision they could issue the letter under would be para. 2 and, seeing that, they would also have seen that all that they needed to do was to state the amount due and to ask for settlement within seven days, citing the plaintiff's right to repayment on demand under para. 1. Without the allegation of default, however, the notice would unquestionably be good as a notice under para. 2.

The defendant having failed to pay on the demand was, after seven days as provided in para. 2, that is on 12 May, in breach of its covenant under para. 1.

By 20 July 1992 the breach had continued for more than two months, more than the one month prescribed by subsection (1) of s. 254, let alone the alternative period of seven days specified in para. 30 of the annexure. So on 20 July 1992 a notice in Form D was issued. It gave 14 days for remedying the breach. That is more than the alternative period of seven days specified in para. 30 as allowed by para. (b) of subsection (1) of s. 254.

The breach was not remedied, and on 1 October 1992 this application for an order for sale was made.

Except for the allegation of default in the solicitors' notice, there would be nothing to question about the issuance of the Form 16D notice under s. 254 in this case.

Does the allegation of default render invalid the solicitors' notice and, consequently, the subsequent notice in Form 16D? I do not think so. It was an unjustified allegation no doubt, but could not have prejudiced or misled the defendant in any way. It must or should have known that there had been no default, that the plaintiff was entitled to repayment on demand, and that the plaintiff was making a demand in exercise of that right.

It may be argued - although it actually was not in this case - that if the plaintiff had acted instead under s. 255 and issued Form 16E the defendant would be entitled to the statutory period of one month because s. 255 does not allow an alternative period to be specified, but in actual fact the defendant had two months after the notice in Form 16D was served before the plaintiff applied for an order for sale. So the issuance of the Form 16D notice has not, in that respect, placed the defendant at a greater disadvantage than if Form 16E had instead been issued.

I think I have dealt with all the matters raised by learned Counsel for the defendant. I am not satisfied that there exists any cause why I should not order the lands to be sold.